85-105 (1)

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CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JEFFREY A. SISSON, PETITIONER

v.

J. LYNN HELMS, Administrator,
Federal Aviation Administration and
ROBERT FAITH, Alaska Regional
Administration, RESPONDENTS

Petition for Writ of Certiorari to
The United States Court of Appeals
For the Ninth Circuit

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For the Ninth Circuit

QUESTIONS PRESENTED FOR REVIEW

1. Did the Ninth Cirucit Court of Appeals err in determining that the District Court found no positions to be available for which the petitioner was qualified in the field for which he had applied?

2. Did the Ninth Circuit err in failing to address the appropriate legal standard to be applied to the facts elicited during trial?

TABLE OF CONTENTS

PAGE

Questions Presented for Review i

Table of Contents ii

Table of Authorities iv

The Opinion Below 2

Statement of Jurisdiction 2

Statutes Involved 3

Statement of the Case 3

Reasons for Granting the Writ 8

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE INHERENT CONFLICT BETWEEN THE SPECIFIC FINDING OF FACT BY THE DISTRICT COURT AND THE WHOLLY INCONSISTANT AND OPPOSITE FINDING BY THE CIRCUIT COURT OF APPEALS.

Appendix A - Ninth Circuit Opinion Sisson v. Helms, 84-3522 dated January 8, 1985 . . . . . A - 1

Ninth Circuit Denial of Petiton for Rehearing, Sisson v. Helms, dated February 4, 1985 . . . . . A - 2

Ninth Circuit Amendment of
Opinion Caption ORDER dated
March 1, 1985 . . . . . A - 3

Appendix B
Federal Rules Civil Procedure
§41(b)
§52(a)
28 USC §1291
29 USC §794
29 USC §794(a)
42 USC §§2000e-5
42 USC §§2000e-16
29 CFR §1613.702-704

Appendix C
Findings of Fact District Ct.
5-893 to 6-943 . . . . . C - 1

Memorandum and Order District Court
dated October 26, 1983 . . . . . C - 2

Journal Entry of Judgment
dated October 28, 1983 . . . . . C - 3

TABLE OF AUTHORITIES

CASES — PAGE

Canadian Transport Co. v. Irving Trust
548 F.2d 53 (CA 9, 1977) 8

De Medina v. Reinhardt
686 F.2d 997 (CA DC 1982) 7,8

Kelly v. Southern Pacific Co.
419 US 318, 95 S.Ct. 475 (1974) . . 10

Movible Offshore Inc. v. M/V Wilken A. Falgout
471 F.2d 268 (CA 5, 1973) 7

Prewitt v. U.S. Postal Service
662 F.2d 292 (5th Cir. 1981) . . . 5,6

Rochez Bros. Inc. v. Rhoades
527 F.2d 880 (CA3 1975) 10

STATUTES INVOLVED

(See Appendix [B]).

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Petition for Writ of Certiorari to
The United States Court of Appeals
For the Ninth Circuit

Petitioner, JEFFREY A. SISSON, respectfully prays a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on October 28, 1983.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported at Sisson v. Helms NO. 84-3522 and is printed in Apendix A-1 hereto, infra. The judgment of the District Court is printed in Apendix C-1 and C-2 hereto, infra. The Journal Entry of Judgment of The District Court is printed in Appendix C-3 hereto, infra.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered onJanuary 8, 1985. A timely petition for rehearing was denied on February 4, 1985. (Appendix A-2 infra. The jurisdiction of the Supreme Court is invoked under 28 U.S. Code 1257 (3).

QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals err in determining that the District Court

found no positions to be available for which the petitioner was qualified in the field for which he had applied?

2. Did the Ninth Circuit err in failing to address the appropriate legal standard to be applied to the facts elicited during trial?

STATUTES INVOLVED

(See appendix [B]).

STATEMENT OF THE CASE

This is a handicap discrimination action brought by the petitioner, Jeffery A. Sisson pursuant to 42 U.S.C. section 2000E-5, 42 U.S.C. 2000E-16 and the Rehabilitation Act of 1973, (29 U.S.C section 791, et seq.). The petitioner alleged that the United States Federal Aviation Administration (FAA) discriminated against the petitioner on the basis of his handicap in refusing to consider him for a job for which he had applied,

i.e., an electronics technician in the Airways Facilities Division of the FAA. The case was originally filed on July 24, 1981 with trial commencing on January 11, 1983 and ending on February 7, 1983. At the close of the trial the District Court entered on the record findings of fact to be incorporated in its decision which was to come at a later date. On October 26, 1983, the District Court entered its "Memorandum and Order" finding judgment in favor of the defendant on all claims, Appendix C-2.

At the conclusion of the trial in February the District Court made the specific finding that "the applicant (petitioner) was entitled to a fair chance for the position for which he sought employment and that in the period between July, 1979 and August, 1980 there were several opportunities within the duty level GS-3/4 for which he aspired" Ap-

pendix C-1 at page 5-903. The court further found that "he was entitled to be considered, at least referred to and interviewed by someone in the hiring authority within the Airways Facilities Division for which he sought employment" Appendix C-1 at page 5-904.

In the District Court's memorandum and order entered some eight months after the trial, the court incorporated its original findings of fact. The essence of the court's memorandum and order found that the petitioner was incapable of physically performing the tasks of an electronics technician and therefore, was not "otherwise qualified" as is required under the standards as set forth Prewitt v. U.S. Postal Service, 662 F.2d 929 (5th Cir. 1981) Appendix C-2 at page 9.

The appeal was taken to the Ninth Circuit on the basis that the court below did not properly apply the standard in Prewitt supra, to the facts presented at trial. Appendix C-2. The Ninth Circuit declined to address the issue as to whether the physical requirements were job related and if so, whether the government failed to prove that a reasonable accommodation to the petitioner's handicap was not possible, finding instead that there were no positions available at the time of the petitioner's application Appendix A at page 92.

This petition comes to the Supreme Court as a result of the inherent inconsistency between the findings of fact between the District Court's decision in October, 1983 and the rulings from the Ninth Circuit upholding the District Court's decision in

January and February 1985. As was previously stated the District Court specifically determined that at that time the plaintiff applied for a position with the Federal Aviation Administration in the Airways Facilities Division there were jobs available, supra at pages 5 & 6. The Ninth Circuit on the other hand made a specific finding that the District Court held there were no jobs available at the time of the plaintiff's application, supra at page 7. As a result of the Ninth Circuit Court's finding that no positions were available it declined to address the issue of the appropriate standard to be applied to the plaintiff's case. In arriving at this decision the Ninth Circuit disregarded the specific finding of fact made by the District Court in February, 1984 and declined to rehear the

argument when the petitioner so moved necessitating that the petitioner pray this court for relief.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE INHERENT CONFLICT BETWEEN THE SPECIFIC FINDING OF FACT BY THE DISTRICT COURT AND THE WHOLLY INCONSISTANT AND OPPOSITE FINDING BY THE CIRCUIT COURT OF APPEALS.

At the outset it should be undisputed that in a civil case tried without a jury the trial judge may make oral findings from the bench. Movible Offshore Inc. v. M/V Wilken A. Falgout 471 F.2d 268 (CA5, 1973)

Likewise, Rule 52(a) Federal Rule Civil Procedure mandates the District Court to enter such findings on the record for appropriate review. De Medina v. Reinhardt 686 F.2d 997 (CA DC 1982)

In the instant case the District Court

made a direct and detailed factual finding for which the petitioner applied during the period of his application supra. The Circuit Court proceeded to disregard that specific finding and hold that there were no jobs available supra at page 7.

A de novo review may be made by the appellate court where, although the District Court failed to make findings of fact as required by Rule 52(a) Federal Rules Civil Procedure there are sufficient solid facts discernible from the record to enable it to render a decision. Canadian Transport Co. v. Irving Trust 548 F.2d 53 (CA9, 1977). The Canadian Transport case is the classic application of the de novo procedure. There the issue arose upon a motion for preliminary injunction supported by affidavits. The District Court in denying the injunction

made no findings of fact but the record was sufficient to allow the Appellate Court to independently make the necessary factual determinations Id. at 55.

In the case at bar the reverse situation occurred with the Appellate Court directly contradicting a specific finding made by the District Court. This the Court is precluded from doing unless it first determines that the findings by the trial court are completely devoid of minimum evidentiary support displaying some hue of credibility. Rochez Bros. Inc. v. Rhoades 527 F.2d 880 (CA3, 1975). No such determination was made by the Appellate Court and such is required prior to overturning a factual finding of the trial court Kelly v. Southern Pacific Company 419 US 318, 95 S.Ct 472 (1974). Indeed if the Appellate Court was faced with

apparent inconsistant findings from the trial court the appropriate action would be to remand the case for re-examination. Id. at 332. However the "Memorandum and Order" supplementing the original findings by the trial court was not inconsistant. At no time did the trial court find jobs to be unavailable appendix C-1, C-2. The basis for ruling adverse to the petitioner was founded upon the legal standard to be applied to the F.A.A., an issue briefed and argued to the Ninth Circuit but not ruled upon by that Court. The petitioner is thus left wholly in the dark as to the reasons for the decisions.

CONCLUSION

Wherefore, petitioner respectfully prays that a writ of certiorari be granted and the case be remanded to the Ninth Circuit for a determination of the appropriate legal standard to be applied.

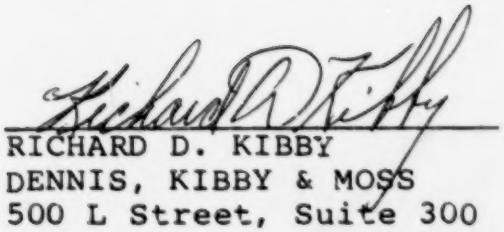
CERTIFICATE OF SERVICE - SERVICE BY MAIL.

I, Richard D. Kibby, a member of the Bar of the Supreme Court of the United States and counsel of record for Jeffery A. Sisson petitioner herein, hereby certify that on May 6, 1985, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Petition For Writ of Certiorari on the party herein, as follows:

On Sue Ellen Tatter, respondent's attorney of record herein, by depositing such copies in the United States Post Office, addressed to the post office address of Sue Ellen Tatter, the above-named respondent's counsel of record, at 701 C Street, Anchorage, Alaska 99501.

All parties required to be served have been served.

Dated June 6, 1985



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APPENDIXES

JEFFREY A. SISSON,
Plaintiff-Appellant,

v.

J. LYNN HELMS, Administrator,
Federal Aviation Administration and
ROBERT FAITH, Alaska Regional
Administration,
Defendants-Appellees.

United States Court of Appeals,
Ninth Cirucit.

Argued and Submitted Nov. 9, 1984.
Decided Jan. 8, 1985.

85 pp

APPENDIXES

JEFFREY A. SISSON,
Plaintiff-Appellant,

v.

J. LYNN HELMS, Administrator,
Federal Aviation Administration and
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Defendants-Appellees.

United States Court of Appeals,
Ninth Cirucit.

Argued and Submitted Nov. 9, 1984.
Decided Jan. 8, 1985.

APPENDIX A

JEFFREY A. SISSON,
Plaintiff-Appellant,

v.

J. LYNN HELMS, Administrator,
Federal Aviation Administration and
ROBERT FAITH, Alaska Regional
Administration,
Defendants-Appellees.

United States Court of Appeals,
Ninth Cirucit.

Argued and Submitted Nov. 9, 1984.
Decided Jan. 8, 1985.

Handicapped applicant for federal employment brought action alleging discrimination. The United States District Court for the District of Alaska, James M. Fitzgerald, Chief Judge, entered judgment for the government, and applicant appealed. The Court of Appeals, Alarcon, Circuit Judge, held

that District Couirt's finding that applicant failed to prove that there were jobs available in the FAA division in which he applied was supported by the evidence.

Affirmed.

1. Civil Rights 13.13(1)

Handicapped person seeking relief from alleged discrimination in federal employment must prove that he applied for job for which federal employer was seeking applicants, that he is qualified for position in spite of his handicap under all but physical criteria being challenged as discriminatory, that he has handicap that prevents him from meeting physical criteria from employment, that physical standards which must be met as condition of employment have disproportionate impact on persons suffering from plaintiff's handicap, that despite his qualifications, his applicaton was rejected, and that

position remained open and employer continued to seek applicants from persons who did not have the handicap. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

2. Civil Rights 13.13(1)

Handicapped person seeking relief from alleged discrimination in federal employment must make facial showing or present plausible reasons to believe that physical criteria are not job related or that handicap can be accommodated. Rehabilitation Act of 1973, § 504, as ameded, 29 U.S.C.A. §794.

3. Civil Rights 13.13(1)

If plaintiff establishes prima facie case of handicap discrimination in federal employment, burden of producing credible evidence shifts to employer to show that physical criteria offer as justification for refusal to hire plaintiff are job related; if

issue of reasonable accommodation is raised, federal employer must then be prepared to make further showing that accomodation cannot reasonably be made that would enable handicapped applicant to perform essentials of the job safely. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

4. Civil Rights 13.13(1)

If federal employer presents credible evidence that physical requirements are job related, burden shifts back to handicapped person seeking relief from alleged discrimination to present persuasive evidence that other selection criteria without similar discriminating effect would also serve employer's legitimate interest in efficient and trustworthy workmanship. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

5. Civil Rights 13.13(1)

If in response to evidence offered by handicapped person seeking relief from alleged discrimination in federal employment that reasonable accommodation for his handicap can be made, employer presents credible evidence that reasonable accommodation is not possible or pratical, plaintiff must bear burden of coming forward with evidence that suggests that accommodation may in fact be reasonably made. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

6. Civil Rights 13.13(1)

In action brought by handicapped person seeking relief from alleged discrimination in federal employment, plaintiff bears burden of persuading trier of fact by preponderance of thd evidence that he was denied employment solely because of his handicap.

Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

7. Federal Courts 776, 858

In deciding whether district court's findings in action brought by handicapped person seeking relief from alleged discrimination in federal employment are supported by the evidence, Court of Appeals must apply clearly erroneous rule; in determining whether facts proven by plaintiff establish essential element of his cause of action, Court of Appeals must make independent de novo review of the record. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

8. Civil Rights 13.13(3)

In applicant's action alleging discrimination in federal employment based on handicap, district court's finding that applicant

failed to prove that there were jobs available in the FAA division in which he applied was supported by evidence that memorandum encouraging supervisors to nominate employees to attend training academy was not intended to identify existing vacancies. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

Appeal from the United States District Court for the District of Alaska.

Before WRIGHT, SNEED AND ALARCON, Circuit Judges.

ALARCON, Circuit Judge:

Jeffrey Sisson appeals from the dismissal after trial on the merits of his handicap discrimination claim filed pursuant to The Rehabilitation Act of 1973 (amended 1978), 29 U.S.C. §§ 791-794a.

Jeffrey Sisson claims that the district court erred in finding that the physical criteria for the position of electronics technician in the Airways Facilities Division were job related and that he was not discriminated against soley on the basis of his handicap.

In review Jeffrey Sisson's claim, we must interpret The Rehabilitation Act of 1973 (amended 1978) as it applies to a disparate impact claim and a surmountable claim of discrimination solely on the basis of a physical handicap. In performing this task, we will first discuss the facts which must be proved by a handicapped person to prove discriminaton as well as the burden placed on the federal employer if a prima facie case has been presented. Secondly, we will examine the facts to determine if the

court's finding that Jeffrey Sisson failed to prove that he was denied employment soley because of his handicap is supported by the record.

I

PROOF OF HANDICAP DISCRIMINATION

Section 504 of The Rehabilitation Act of 1973 (amended 1978), (hereinafter The Act), 29 U.S.C. § 794 provides in pertinent part as follows:

> No other wise qualified handicapped individual ... as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity ... conducted by any Executive agency or by the United States Postal Service.

[1] A handicapped person seeking relief from alleged discriminaton under section 794 must prove the following:

One. That he applied for a job for which a federal employer was seeking applicants. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1972) (complaintant alleged race discriminaton in employment).

Two. That he is qualified for the position in spite of his handicap under all but the physical criteria being challenged as discriminatory. Southeastern Community College v. Davis, 442 U.S. 397m 406, 99 S.Ct. 2361, 2367, 60 L.Ed.2d 980 (1979); Bevtivegna v. United States, 694 F.2d 619, 621 (9th Cir. 1982); Prewitt v. United States Postal Service, 662 F.2d 292, 307 (5th Cir. 1981)

Three. That "[h]e has a handicap that prevents him from meeting the physical criteria for employment." Prewitt v. United

States Postal Service, 662 F.2d at 309-10.

Four. That the physicial standards which must be met as a condition of employment for the vacant position have a disproportionate impact on persons suffering from the plaintiff's handicap.

Five. That despite his qualifications his applicaton was rejected. McDonnell Douglas Corp. v. Green, 411 U.S. at 802, 93 S.Ct. at 1824.

Six. That the position remained open and the employer continued to seek applicants from persons who did not have the plainitff's handicap. See McDonnel Douglas Corp. v. Green, 411 U.S. at 802, 93 S.Ct. at 1824 (race discrimination).

[2] The plaintiff must also make a facial showing or present plausible reasons to believe that the physical criteria are not

"job related" or that the handicap can be accommodated. Prewitt v. United States Postal Service, 662 F.2d at 310

[3] If the plaintiff establishes a prima faci case of handicap discrimination by proving each of the foregoing elements, hte burden of producing credible evidence shifts to the employer to show the following facts:

One. "[T]he physical criteria offered as justificaton for refusal to hire the plaintiff are "job related," i.e. that persons who suffer from the handicap plaintiff suffers and who are, therefore, unable to meet the challenged standards, cannot safely and efficiently perform the essentials of the position in question." Id. at 310

Two. "If the issue of reasonable accommodation is raised, the agency must then be prepared to make a further showing that the

accommodation cannot reasonably be made that would enable the handicapped applicant to perform the essentials of the job safely ..." Id. at 310.

[4] If the employer presents credible evidence that the physical requirements are job related, the burden shifts back to the plaintiff to present persuasive evidence that "other selection criteria without a similar discriminating effect would also serve the employer's legitimate interest in efficient and trustworthy workmanship." Id. at 310. See Dothard v. Rawlinson, 433 U.S. 321, 329, 97 S.Ct. 2720, 2727, 53 L.Ed.2d 786 (1977) (weight and height requirements in a sex discrimination case). See also Albermarle Paper Co. v. Moody, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975) (pre-employment tests in race dis-

crimination matter); McDonnell Douglas Corp. v. Green, 41 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973) (civil rights activities in a race discrimination suit).

[5] If in response to the plaintiff's evidence that reasonable accommodation can be made, the employer "presents credible evidence that reasonable accommodation is not possible or practicable, the plaintiff must bear the burden of coming forward with evidence that suggests that accommodation may infact be reasonably made." Prewitt v. United States Postal Service, 662 F.2d at 310.

[6] As in any other civil litigation, the plaintiff bears the burden of persuading the trier of fact by a preponderance of the evidence that he was denied employment solely

because of his handicap. See United States Postal Service v. Aikens Board of Governors, 460 U.S. 711, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983) (race discrimination).

II

[7] Having determined the proper "allocation of burdens and order of presentation of proof," Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981) in a handicap discrimination case, we must next evaluate the evidence to see if discrimination was proved. In deciding whether the district court's findings are supported by the evidence, however, we must apply the clearly erroneous rule. Thorn v. City of El Segundo, 726 F.2d 459, 464 (9th Cir. 1983), cert. denied, -- U.S.--, 105 S.Ct. 380, 83 L.Ed.2d 315 (1984). In determining whether

facts proven by the plaintiff establish an essential element of his cause of action, we must make an independent de novo review of the record. Gay v. Waiter's & Dairy Lunchmen's Union, 694 F.2d 531, 540 (9th Cir. 1982).

A. Available Position

[8] On July 29, 1979, Jeffrey Sisson applied for an entry level predevelopmental position as an electronics technician n the Federal Aviation Administration's (hereinafter FAA) Airways Facilities Division in Anchorage, Alaska. At that time, the FAA employment register was closed for electronics technician positions. Upon receipt of this applicatoin, Marge Tideman, a personnel staffing specialist for the Airways Facilities Division contacted the electronics technician hiring supervisor, Bob Wilson.

Mr. Wilson advised Mrs. Tideman that there were no vacancies. Because of the fact there were no vacancies. Because of the fact there were no vacancies, Jeffrey Sisson's application was not immediately forwarded to any supervisor in the Airways Facilitites Division. However, he was interviewed in the Avionics Maintenance Unit but was not offered employment due to the unavailability of any positions in the division.

Sisson's father, Glen Sisson, was a journeyman level electronics technician at the Airways Facilities Division. Glen Sisson erroneously believed that electronics technician positions were available because he was aware of a memorandum that encouraged supervisors to nominate presently employed FAA employees to attend the FAA training

academy in Oklahoma City. The evidence presented by the government showed that this memorandum was not intended to identify existing vacancies.

Glen Sisson persuaded his supervisor, Mark Kelliher, to interview his son. Kelliher, who was aware of the recruitment memorandum, agreed to interview Jeffrey. He rated Sisson as an "excellent candidate." Sisson was not hired, however, because there were no available postions.

Glen Sisson asked George B. Woodbury, Chief of the Personnel Management Division for the Alaska Region of the FAA to assist his son in obtaining a position. Woodbury sent Jeffrey Sisson to the Aviation Medical Division Chief, Dr. Hepler, for a medical interview. Dr. Hepler reviewed the medical

records prepared by Sisson's personal physician, Dr. Schlosstein. Jeffrey Sisson suffers from ankylosing spondylitis, which causes stiffening of his joints, limiting the movement of his spine, knees, elbows, and wrists. Dr. Schlostein's report stated that because Sisson could not perform activities involving significant lifting or a significant amount of walking or standing, he was "fairly well suited for work as a technician which he can do primarily at a bench or desk .." Dr. Hepler adopted Dr. Schlosstein's evaluation. Jeffrey Sisson's application, together with Dr. Hepler's report, was referred back to Mr. Wilson. Mr. Wilson determined that there were no bench or desk jobs available at the Airways Facilities Division in Anchorage.

On February 26, 1980, Jeffrey Sisson was

notified in writing that there were no positions limited to "bench-type duties" at the Airways Facilities Division. In July, 1980, Jeffrey Sisson rejected anoffer of temporary position as a GS-4 electronics technician in Oklahoma City. Jeffrey Sison declined this offer because it was too far from his home and not of an aceptable grade level.

The district court's finding that Jeffrey Sisson failed to prove that there were jobs availabel at the Airways Facilities Division is supported by evidence and wasnot clearly erroneous. Jeffrey Sisson failed to prove an essential element of his cause of action in that he applied for a job for whcih a federal employer was seeking applicants.

The district court's finding is in accordance with Teamsters v. United States, 431

U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), where the Supreme Court noted:

> Although the McDonnell Douglas formula does not require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought.

Id., 431 U.S. at 356 n. 44, 97 S.Ct. at 1866 n. 44.

Sisson's failure to prove that there was an available position makes it unnecessary for us to decide whether the physical restrictions were job related and if so, whether the government failed to prove that

a reasonable accomodation to his handicap was not possible.

Because Sisson failed to prove that he was not offered employment solely on the basis of his handicap, the judgment is AFFIRMED.

APPENDIX A-2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY A. SISSON,

Plaintiff-Appellant,

vs.

J. LYNN HELMS, Administrator Federal Aviation Administration and ROBERT FAITH, Alaska Regional Administration,

Defendants-Appellees.

No. 84-3522
D.C. No. A81-365 Civil

O R D E R

Appeal from the United Ststes District Court
for the District of Alaska
James M. Fitzgerald,
District Judge, Presiding
Argued and submitted November 9, 1984

BEFORE: WRIGHT, SNEED, and ALARCON,
Circuit Judges.

Appellant's petition for rehearing is denied.

APPENDIX A-3

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY A. SISSON,	)	
	)	
Plaintiff-Appellant,	)	
	)	No. 84-3522
-vs-	)	DC# CV A81-365 JMF
	)	
J. LYNN HELMS, et al.	)	
	)	
Defendants-Appellees.	)	
	)	

APPEAL from the United States District Court for the Anchorage District of Alaska.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Anchorage District of Alaska and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this Cause be, and hereby is affirmed.

cc: Richard Kibby
Sue Ellen Tatter, AUSA
Judge Fitzgerald

Filed and entered January 8, 1985

Filed
March 8, 1985
United States Dist. Ct.
District of Alaska

A TRUE COPY Mar 4, 1985
ATTEST
Philip B. Winberry
Clerk of Court
by: Joseph Williams
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY A. SISSON	)	
	)	No. 84-3522
Plainitff-Appellant	)	
	)	D.C. No.
vs.	)	A81-365 Civil
	)	
J. LYNN HELMS, et al.	)	
	)	O R D E R
Defendants-Apellees	)	
	)	

Appeal from the United States District Court
for the District of Alaska
James M. Fitzgerald,
District Judge, Presiding
Argued and submitted November 9, 1984

BEFORE: WRIGHT, SNEED, and ALARCON, Circuit Judges.

The opinion filed January 8, 1985, slip op. at 87 is amended as follows:

On page 90 of the slip opinion, the third paragraph is ordered stricken and the following language should be inserted instead:

> As in any other civil litigation, the plaintiff bears the burden of persuading the trier of fact by a preponderance of the evidence that impermissible handicap discrimination was a significant factor in the adverse employment decision. See United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715-16 (1983) (race discrimination).

A TRUE COPY Mar. 4, 1985
ATTEST
Philip B. Wineberry
Clerk of Court
by: Joseph Williams
Deputy Clerk

APPENDIX B

Appendix (B)

Fed.R.Civ.P. 41(b). Involuntary Dismissal: Effect Thereof:

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an acton or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, withut waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court

renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).

Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for imporper venue, or for failure to join a party under Rule 19, operates as an adjudiction upon the merits.

Rule 52(a): In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately itsconclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injuctions the court shall similarly set forth the findings

of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

28 U.S.C. § 1291. Final Decisions of District Courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

29 U.S.C. § 791. Employment of Handicapped Individual.

(a) Interagency Committee on Handicapped employees; establishment; membership; co-chairmen; availability of other Committee resources; purpose and functions. There is established within the Federal Government an Interagency Committee on Handicapped Employees (hereinafter in this section referred to as the "Committee"), comprised of such members as the President may select, including the following (or their designees whose positions are Executive Level IV [5 USCS § 5315] or higher): the Chairman of the Civil Service Commission, the Administrator of Veterans' Affairs, and the Secretaries of Labor and Health, Education, and Welfare. The Secretary of Health, Education, and Welfare and the Chairman of the Civil Service Commission shall serve as cochairmen of the Committee. The resources of the President's

Committees on Employment of the handicapped and on Mental Retardation shall be made fully available to the Committee. It shall be the purpose and function of the Committee (1) to provide a focus for Federal and other employment of handicapped individuals, and to review, on a periodic basis, in cooperation with the Civil Service Commission, the adequacy of hiring, placement, and advancement practices with respect to handicapped individuals, by each department, agency, and instrumentality in the executive branch of Government, and to insure that the special needs of such individuals are being met; and (2) to consult with the Civil Service Commission to assist the Commission to carry out its responsiblities under subsections (b), (c), and (d) of this section. On the basis of such review and consultation, the

Committee shall periodically make to the Civil Service Commission such recommendations for legislative and administrative changes as it deems necessary or desirable. The Civil Service Commission shall timely transmit to the appropriate committees of Congress any such recommendations.

(b) Federal agencies; affirmative action program plans. Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, with one hundred and eighty days after the date of enactment of this Act [enacted Sept. 26, 1973], submit to the Civil Service Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department,

agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for handicapped individuals.

29 U.S.C. § 794. Nondiscrimination Under Federal Grants and Programs; Promulgation of Rules and Regulations.

No otherwise qualified handicapped individual in the United States, as defined in section 7(7) [29 USCS §706(7)], shall, solely by reason of his handicap, be excluded

from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitiation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

29 U.S.C. § 794a. Remedies and Attorneys' Fees.

(a)(1). The remedies, procedures, and rights set forth in section 717 of the Civil

Rights Act of 1964 (42 U.S.C. 2000e-16 [42 USCS § 2000e-16], including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5 (f) through (k) [42 USCS § 2000e-5(f)-(k)], shall be available, with respect to any complaint under section 501 of this Act [29 USCS § 7981], to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act [29 USCS § 794].

42 U.S.C. § 2000e-5. Prevention of Unlawful Employment Practices.

(j) Appeals. Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code [28 USCS §§ 1291, 1291].

(k) Attorney's Fee. In any action or proceeding under this title [42 USCS §§ 2000e et seq.] the court, in its discretion,

may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-16. Nondiscrimination in Federal Government Employment.

(a) Discrimination Prohibited. All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, [5 USCS § 102] in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, [5 USCS § 105] United States Code (including employees and applicants for employment who are paid from nonappropriated

funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Role of Civil Service Commission; compliance of departments and agencies with rules and regulations.

Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies,

including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall--

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all

agency equal employment opportunity programs, periodically obtaining and publishing (on at least semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organization relating to equal employment opportunity. The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall b notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to--

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission

upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706 [42 USCS § 2000e-5], in which civil action the head of

the department, agency, or unit, as appropriate, shall be the defendant.

(d) Application of certain provisions. The provisions of section 706(f) through (k) [42 USCS §§ 2000e-5(f)-(k)], as applicable, shall govern civil actions brought hereunder.

(e) Continuing responsbility of agencies and officials to assure nondiscrimination. Nothing contained in this Act [title] shall relieve any Government agency or official of its or his primary responsiblity to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

29 C.F.R. § 1613.702 Definitions.

(f) "Qualified handicapped person" means with respect to employment, a handi-

capped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used: (1) Meets the experience and/or education requirements (which may include passing a written test) of the position in question, or (2) meets the criteria for appointment under one of the special appointing authorities for handicapped persons.

29 C.F.R. § 1613.703 General Policy.

Agencies shall give full consideration to the hiring, placement, and advancement of qualified mentally and physically handicapped persons. The Federal Government shall become a model employer of handicapped individuals. An agency shall not discrimi-

nate against a qualified physically or mentally handicapped person. 29 C.F.R. § 1613.704 Reasonable Accommodation.

(a) An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship in the operation of its program.

(b) Reasonable accommodation may include, but shall not be limited to: (1) Making facilities readily accessible to an usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment

or modification of examinations, the provision of readers and interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of the agency in question, factors to be considered include: (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) the type of agency operation, including the composition and struture of the agency's work force; and (3) the nature and the cost of the accommodation.

APPENDIX C-1

I find that the applicant was entitled to a fair chance for the position for which he sought employment and that in the period between July of 1979 and August of 1980 there were several opportunities within the entry level GS-3, 4 to which he aspired.

Now, it's also, I believe, clear from the evidence that persons who are employed in those positions did not come off of the register, and it may be a fact of life these days that the only possibility of getting an electronics technician position within the Alaska region may be because the applicant fits within a special hiring authority of one sort or another -- the applicant is under some educational program sometimes provided to the economically disadvantaged, or comes through a special hiring authority

provided within the agency for internal advancement or promotion, or comes from a program to benefit the disadvantaged such as those who are on disability, because it seems from the evidence that the hirings at the entry level for which the plaintiff aspired all come from specific hiring authorities, and it may be that there may be some difficulty under the regulations or the procedures of the agency to establish some sort of priority among these special hiring authorities. I don't think it is necessary to address that at this moment.

I find that his rejection was due toa medical evaluation made by the flight surgeon, who took at face value his treating physician's reports, evaluations, adn his medical records. Since it is within the evidence, I find that the requirements contained in form 78-110 that were offered in

justification of the decision not to employ him when the inquiry was made by the division in the FAA investigating his claim of discrimination are not always the qualifications necessary for an electronics technician.

APPENDIX C-2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JEFFREY A. SISSON Plaintiff v. J. LYNN HELMS, Administrator, Federal Aviation Administration and ROBERT FAITH, Alaska Regional Administration, Defendants,	MEMORANDUM AND ORDER

NO. A81-365 Civil

After trial on the merits in this action, I made findings on January 25 and 26, 1983. to the extend that facts stated below do not appear in the earlier findings, they shall constitute additional findings of fact.

Jeffrey A. Sisson suffers from juvenile ankylosing spondylitis. His illness causes a stiffening in his joints that renders painful if not impossible movements that

most people take for granted. Sisson has not, however, allowed his affliction to limit needlessly his ambitions. He pursues opportunity in a commendable manner.

Sisson brought this lawsuit to seek relief from what he rerceived as federal government discrimination against him because of his handicap. Sisson contends that he was, initially, denied empoyment with the Federal Aviation Administration (FAA), and then, appointed to a temporary position that was beyond his physical competence. The actions ultimately resultd in Sisson not receiving a permanent position with the FAA. Sisson maintains that he is otherwise qualified for the position for which he applied, and concludes that he was denied employment soley because of his handicap.

Plaintiff became afflicted with ankylosing spondylitis when in the eleventh grade at school. This condition affects the spinal cord and at times peripheral joints. Sisson's condition is extensive, affecting his knees, elbows, wrists and spine.

Sisson was certified as severely disabled by the State of Alaska, Division of Vocational Rehabilitation. It is not disputed that Sisson is properly considered a handicapped individual within the ambit of the Rehabilitation Act of 1973, as amended. 29 U.S.C. §794.

Sisson first sought employment with the FAA, Alaska Region, in July of 1979 when he applied for an entry level predevelopmental position as an electronic technician in the Airways Facilities Division. He requested employment at the Anchorage Central Control

Center under an appointing authority for handicapped individuals.

The application went to Ms. Tiedman, a staffing specialist. Without identifying Sisson as handicapped, Tiedman telephoned Mr. Wilson, a supervisor in Airway Facilities, and asked whether any predevelopmental positions were available in his division. Wilson canvassed his division and determined that the number of new trainees in the division, and the commitments previously made under an educational program precluded adding a new trainee at that time. In the same month, August of 1979, Mr. Pebsworth, Chief, Avionics Maintenance Unit, Flight Standards Division, interviewed the plaintiff. Pebsworth informed Sisson that a new trainee scheduled to begin in September prevented the hiring of any additional trainees. (Pl. exh. 2).

At this juncture Sisson's father, who was employed with the FAA as a journeyman electrical technician in the Anchorage Center, and who was respected amongst his peers, attempted to influence favorably his son's prospects fro receiving employment. The elder Sisoon contacted Mr. Woodbury, Chief of Personnel, and asked if he would assist his son. Because of the elder Sisson's intervention, Woodbury sent Sisson to the Aviation Medical Division Chief, Dr. Hepler, for a medical examination.

This was not the usual way applicants are sent to Dr. Hepler. Ordinarily, before an applicant is referred to Dr. Hepler for evaluation, he has progresses throught the application process to a point where a specific position that he may fill has been identified. Dr. Hepler would then evaluate

the applicant and determine whether he possessed the physical qualifications to perform the tasks that particular job demanded. But because Mr. Woodbury had intervened, Dr. Hepler had no identified position in mind for which he was to evaluate Sisson.

Dr. Hepler received and examined Sisson's medical records. Included herein was an assessment of Sisson's physical limitations prepared by plaintiff's own physician, Dr. Schlosstein. Dr. Schlosstein stated:

> Mr. Sisson I believe is limited in his abilities to perform activities. He I believe would not be wise nor able to perform activities which require any significant lifting or significant amount of walking or standing. He would be I think fairly well suited for work as a technician which he can do primarily at a bench or desk . . .

(Pl. exh. 21). Having no reason to doubt

the credibility of Dr. Schosstein's assessment, Dr. Hepler incorporated that assessment into his own evaluation of Sisson. Dr. Hepler states:

> [Sisson's] physician indicates that he will not be able to perform duties that require significant lifting, standing, or walking. He probably could perform technician type duties that would allow him to work at a bench or desk.

(Pl. exh. 15). Dr. Hepler also indicated that should the FAA consider employing Sisson, Dr. Schlosstein should be asked to review a detailed job duty description sheet. Id. This, Dr. Hepler suggested, would help the FAA determine fairly accurateSisson's ability to perform the tasks of a particular job assignment. Id. Since no job had been identified, there was no particular set of functional requirements that Dr. Hepler used to asses Sisson.

Ms. Tiedman referred Sisson's application and Dr. Hepler's evaluation back to Wilson. Wilson, relying on Dr. Hepler's evaluation, determined that no bench or desk jobs were available. Sisson's application was therefore rejected.

At this point, Sisson's father onece again intervened to assist his son. The elder Sisson met with Robert Faith, Regional Diretor of the Alaska Region, FAA. In deference to the elder Sisson's reputation and influence, Faith was able to arrange a 700 hour trial appointment as an electronics trainee in the Avionics Section of the Flight Standard Divsion. This was neither the division nor the position that Sisson had initially sought. Nonetheless, he accepted the offer. The purpose of this offer was to employ Sisson in the hope that a permanent position would become available.

Sisson's 700 hour appointment was extended fro an additional thirty days, expiring in August of 1980. At work, he demonstrated his technical competence. Although he received favorable job evaluations, these evaluations noted the great difficulty Sisson had performing some of the more physically demanding tasks. (Pl. exh. 8). For example, on August 1, 1980 Mr. Foster sent a memo to Mr. Pebsworth, Chief, Avionics Maintenance Unit. After commenting favorably on Sisson's technical aptitude, Foster stated:

> An Avionics Technician position at the AMB requires physical strength and agility wich I feel regrettably is beyond Mr. Sisson's capabilities. Notably the moving of heavy aircraft power carts and plugging power cart plug into the power connection, carrying equipment up and down aircraft stairs, working at heights required to service and inspect large aircraft from a stand or ladder, working on wireing

(sic) and removing and replacing equipment in extemely tight places requiring unusual body positions.

Because of Sisson's inability to fulfill the more physically demanding tasks, he was not offered a permanent position in the Avionics Section. Even so, another effort was made to find him employment with the FAA. Through Faith's intervention, Sisson was offered a temporary one year bench job in Oklahoma City. The position would become permanent if Sisson performed satisfactorily for the year. Pebsworth discussed with Sisson the job and its requirements. For various reasons, Sisson declined the offer.

The agency made no other offers of employment. Sisson then filed a discrimination complaint which was investigated by the Office of Civil Rights, Department of transportation. After the investigation, Dr. Hepler re-evaluated Sisson's medical record

and determined that Sisson could not fulfill the functional requirements of an electrical technician as detailed on Form 78-110.

Plaintiff maintains that the agency failed to independently examine him, failed to refer his application to a hiring supervisor, and denied employment to him because he could not meeet designated functional requirements outlined on Form 79-110. This, he claims, is discrimination by reason of his handicap. Sisson also maintains that when Faith created the 700 hour position, he created a job that Sisson could no fully perform. Sisson contends that Faith could just have easily created a position in Airways Facilities. Sisson believes he could have fully performed such a position had one been created. Faith's actions, plaintiff concludes, also amount to handicap discrimination. I disagree.

Section 504 of the Rehabilitatoin Act of 1973 (The Act), as amended, 29 U.S.C. §794 provides in part:

> No otherwise qualified handicapped individual . . . defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination . . .under any program or activity conducted by and executive agency or by the United States Postal Service.

The Act, amended in 1978 to add section 505(a)(1), now permits handicapped individuals to bring private actions against federal agencies. 29 U.S.C. §794a; Prewitt v. United States Postal Service, 662 F.2d 292, 301 (5th Cir. 1981). Section 505(a)(1) has made the entire private enforcement apparatus of Title VII, Civil Rights Act of 1964 available to alleged victims of handicap discrimination. 29 U.S.C. §794(a)(1);

Guerriero v. Schultz, 557 F.Supp. 511, 513 (D.C. DC 1983).

To succeed under §794, plaintiff must establish that he is an "otherwise qualified" individual who has been denied employment solely because of his handicap. See, Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979); Pushkin v. Regents of University of Colorado, 658 F.2d 1372, 1385 (10th Cir. 1981); Guerriero v. Schultz, 557 F.Supp. 511, 513 (D.C. DC 1983). Since the government is required to make reasonable accommodations to the known physical limitations of the plaintiff, [1] Sisson must show that with or without reaonable accommodation, he can fully perform that tasks of an electrical technician. See, e.g., Southeastern Community College v. Davis, 442 U.S. 397 (1979); Prewitt v. U.S. Postal Service, 662 F.2d 929 (5th Cir.

1981); Bey v. Bolger, 540 F.Supp. 910 (E.D. Pa. 1982).

There is no uniform physical demanded of an electrical technician. The physical demands vary depending upon the duties of the technician and upon the place or location of the work. Electrical technicians in remote locations of Alaska are on occasion required to lift heavy objects in excess of 100 pounds, load and unload heavy equipment, move across rugged terrain, use snow machines, and work alone.

Sisson could not perform the more demanding tasks required by his 700 hour temporary appointment in Avionics. Sisson nontheless contends that he is "otherwise qualified" because there are other less physically demanding electrical technician positions for which he is competent. Specifically, Sisson maintains that the position of

an electrical technician stationed in the Anchorage Center of the Airway Facilities Division, the division where he applied, would not demand from him anything that he could not physically provide. The agency could accommodate the infrequent instances where his disability prevented him from completing specific tasks.

The government responds that Sisson cannot advance from a predevelopmental position at the Anchorage Center to journeyman position necessary to qualify as a member of the on-duty crew. Journeyman technicians in the Anchorage Center are rotated throughout the region and receive training under diverse conditions outside of Anchorage before assignment to the center. Indeed, the center is the heart of the FAA Alaska operations presenting the most difficult and

varied problems that arise from the air traffic it handles. It is essential, according to the agency, that technicians receive outside training in the more remote areas to develop the skills necessary to perform in the Anchorage Center. Moreover, Anchorage is a desirable job locaton and the FAA seeks to reward qualified technicians with established seniority at the agency by placing them in the Anchorage Center. [2]

The evidence establishes that Sisson could not physically perform the tasks of electrical technicians other than at the Anchorage Center. But given the reasonableness of the FAA's rotation policy, I cannot conclude that Sisson is "otherwise qualified" for the position he desires.

Even if Sisson had proved that he was "otherwise qualified" as an electrical technician, I cannot conclude on the evidence

presented that Sisson failed to gain FAA employment solely because of his being handicapped. The evidence reveals that Sisson's application was handled in an irregular manner. FAA officials went beyond established procedures to treat specially Sisson's application. This was done at the request of Sisson's father, a respected journeyman electrical technician in Airway Facilities. As a result of the elder Sisson's intervention, Sisson was assessed as capable only of performing bench or desk type jobs. Since the FAA had no such jobs available, Sisson's application was rejected. His claim that he was rejected solely because of his handicap is inaccurate.

Sisson also claims that he was denied employment because he failed to meet the functional job requirements listed on Form

78-110. Sisson maintains that these requirements are not "job related" and thus effect a disparate impact on otherwise qualified handicapped individuals. The evidence, however, establishes that because of the irregular manner in which Sisson's application was processed, Dr. hepler never applied the Form 78-110 functional requirements when medically evaluating Sisson. Rather, Dr. Hepler simply accepted Dr. Schlosstein's evaluation that Sisson's condition limited him to bench or desk type jobs.

Sisson's last claim is that the decision not to employ him because he could not perform satisfactorily the 700 hour appointment was based solely on his handicap. This conclusion results, Sisson maintains, from the fact that Faith could have created a 700

hour temporary position in Airways Facilities instead of in Avionics. Had Faith done so, Sisson maintains he could have successfully performed that assignment and demonstrated that he could overcome his disability.

However, evidence adduced at trial indicates that Faith at the instance of Sisson's father created the 700 hour position disregarding normal agency procedures. Ordinarily, before a 700 hour temporary appointment is created, there must be a potential position that the trainee could be expected to fill. In addition, there must be sufficient budget support to fund the new position. In this case because of the elder Sisson's intervention, Faith created a position in Avionics even though no permanent position then existed.

Given that Faith acted irregularly in the first instance, I cannot conclude that he could just have easily created a position for Sisson in Airways Facilities. Moreover, given that Faith acted irregularly at the request of Sisson's father to benefit Sisson, I cannot accept Sisson's contention that the agency's decision not to employ Sisson was based solely on his handicap. To hold otherwise would disregard the extraordinary and irregular events that placed Sisson in the temporary position from which he was subsequently rejected. Had Sisson's father and Faith no intervened, Sisson would not have been given the 700 hour position.

In rejecting Sisson's claims, I find that he was failed to establishthat he is "otherwise qualified" to fill an available position as an electrical technician with

the FAA. I also conclude that Sisson was not denied employment solely because of his being handicapped. On the contrary, the FAA went to unusual and extraordinary lengths to find employment for Sisson because he was the son of a respected agency employee. Under these circumstances, I cannot find that plaintiff has established a violation of 29 U.S.C. §794.

The clerk of court is therefore directed to enter judgment dismissing plaintiff's claims.

MADE AND ENTERED at Anchorage, Alaska, this 26th day of October, 1983.

/s/ James M. Fitzgerald
JAMES M. FITZGERALD
United States District Judge

cc: Dennis, Kibby (Kibby)
USA (Tatter)

FOOTNOTES

1. See, 29 C.F.R. §1613.704(a) (1982). The government is relieved from this obligation if it can demonstrate that "the accommodation would impose an undue hardship on the operaton of its program." Id.

2. To offer Sisson a job in Airways Facilities that would lead without rotation to a journeyman position in the center would require the removal of a journey technician.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JEFFREY A. SISSON, Plaintiff, vs. J. LYNN HELMS, etal. Defendants.	Civil Action Docket No. A81-365 Civil JUDGMENT

This action came on for trial before the court, United States District Judge JAMES M. FITZGERALD presiding. The issues having been duly tried and a decision having been duly rendered, it is ordered and adjudged THAT judgment be entered in favor of defendant on all claims.

APPROVED:

/s/ James M. Fitzgerald
U.S. District Court Judge
JAMES M. FITZGERALD

FILED
Oct 28 1983
United States District Court
District of Alaska
BY: MMH

Dated at: Anchorage, Alaska
cc: Dennis, Kibby (Kibby)
USA (Tatter)
Fitz

/s/ JoAnn Myres
Dated: Oct. 27, 1983
JoAnn Myres, Clerk of Court

/s/ Marvel Hanslaugh
Deputy Clerk of the Court

APPENDIX C-3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JEFFREY A. SISSON, Plaintiff, vs. J. LYNN HELMS, etal. Defendants.	Civil Action Docket No. A81-365 Civil JUDGMENT

This action came on for trial before the court, United States District Judge JAMES M. FITZGERALD presiding. The isues having been duly tried and a decision having been duly rendered, it is ordered and adjudged THAT judgment be entered in favor of defendant on all claims.

Costs taxed in favor of defendant and against plaintiff in the amount of $208.00.

cys re-mailed 11/15/83

APPEALED

APPROVED:

/s/ James M. Fitzgerald
U.S. District Court Judge
JAMES M. FITZGERALD

FILED
Oct 28 1983
United States District Court
District of Alaska
BY: MMH

Dated at: Anchorage, Alaska
cc: Dennis, Kibby (Kibby)
USA (Tatter)
Fitz

/s/ JoAnn Myres
Dated: Oct. 27, 1983
JoAnn Myres, Clerk of Court

/s/ Mavel Hanshaugh
Deputy Clerk of the Court

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
AUG 20 1985

No. 85-105

In the Supreme Court of the United States

OCTOBER TERM, 1985

JEFFREY A. SISSON, PETITIONER

v.

J. LYNN HELMS, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION AND
ROBERT FAITH, ALASKA REGIONAL ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Page

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§ 505(a)(1), 28 U.S.C. 794a(a)(1) 3

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-105

JEFFREY A. SISSON, PETITIONER

v.

J. LYNN HELMS, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION AND
ROBERT FAITH, ALASKA REGIONAL ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner, who is handicapped, filed suit against the Federal Aviation Administration (FAA) in the United States District Court for the District of Alaska alleging employment discrimination under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.[1] Petitioner contends that the factual basis of the court of appeals' decision is inconsistent with the findings made by the district court. Petitioner's contention is without merit and, in any event, presents no significant question warranting review by this Court.

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[1]Section 504 of the Rehabilitation Act of 1973 provides:

> No otherwise qualified handicapped individual * * * as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination * * * under any program or activity conducted by any Executive agency * * *.

1. In July 1979 petitioner applied for an entry level predevelopmental position as an electronics technician in the FAA's Airways Facilities Division in Anchorage, Alaska (Pet. App. C2). Petitioner requested a position at the Anchorage Central Control Center under an appointing authority for handicapped individuals (*ibid.*). However, because of the number of trainees already employed and the number of commitments previously made to participants in an educational program, there were no such positions available (*ibid.*). Petitioner was nevertheless interviewed by the Chief of the Avionics Maintenance Unit, who informed him that all trainee slots had been committed (*ibid.*). Petitioner's father, a journeyman electronics technician employed by the FAA in its Airways Facilities Division, then requested George Woodbury, Chief of the Personnel Management Division for the Alaska Region of the FAA, to help his son secure a position (*ibid.*). Woodbury intervened and, contrary to established procedure, referred petitioner to the Aviation Medical Division Chief, Dr. Hepler, for a medical interview (*ibid.*). Ordinarily, only those applicants slated to fill a particular position are sent for medical interviews (*ibid.*).

Petitioner suffers from ankylosing spondylitis, a condition which stiffens the joints of his spine, knees, elbows and wrists and thereby restricts his limb movement. Dr. Hepler reviewed medical records prepared by petitioner's own physician, which indicated that petitioner's condition prevented him from performing any activity requiring any "significant lifting or significant amount of walking or standing," yet suggested that petitioner was "fairly well suited for work as a technician which he can do primarily at a bench or desk * * *" (Pet. App. C2). Dr. Hepler, incorporating these findings in his evaluation, concluded that petitioner "probably could perform technician type duties that would allow him to work at a bench or desk" (*ibid.*). Petitioner's application and medical evaluation were forwarded

to a supervisor at the Airways Facilities Division, who determined that there were no bench or desk jobs available and notified petitioner accordingly in February 1980.[2]

Petitioner's father once again intervened, this time requesting assistance from Robert Faith, the FAA's Regional Director of the Alaska Region (Pet. App. C2). As a favor to petitioner's father, Faith arranged a 700-hour trial appointment for petitioner as an electronics trainee in the Avionics Section of the Flight Standard Division (*ibid.*). Petitioner accepted the offer, although it was not the position he initially sought. Petitioner was not offered a permanent position at the end of the trial appointment, which had been extended an additional 30 days: FAA personnel officials determined that petitioner, although technically competent, lacked the physical strength and agility necessary to perform the job, which required moving and lifting heavy aircraft equipment, working at heights, and working in extremely tight places (*ibid.*).

Having been denied permanent employment, petitioner filed a complaint with the Office of Civil Rights, Department of Transportation, alleging that he had been discriminated against because of his handicap (Pet. App. C2). Officials investigating petitioner's case subsequently determined that he did not satisfy the functional requirements for a position as an electronics technician (*ibid.*). Petitioner then brought this action in the district court under Section 505(a)(1) of the Rehabilitation Act, 29 U.S.C. 794a(a)(1).[3]

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[2]In July 1980 petitioner rejected an offer for a temporary position as a GS-4 electronics technician in Oklahoma City because of the location and the low pay (Pet. App. C2).

[3]Section 794a(a)(1) provides that:

> The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under section 791 of this title * * *.

2. The district court ruled in the FAA's favor, finding no evidence that the petitioner was denied employment "solely because of his being handicapped" (Pet. App. C2). The court found the physical tasks required of an FAA electronics technician in Alaska to be beyond petitioner's physical capabilities, except perhaps at the Anchorage Center. Yet because the Anchorage Center operation presented the most difficult and varied problems, the court found reasonable the FAA's policy of assigning only senior, experienced journeymen to that facility (*ibid.*). With respect to petitioner's 700 hour temporary appointment in Avionics, the court noted that the position was created as a favor to petitioner's father, temporary assignments ordinarily being made only when a vacancy exists. The court found that no vacancies were available when petitioner was given the temporary appointment (*ibid.*). The court also rejected petitioner's argument that a permanent position could have been created for him (*ibid.*). Indeed, the court implied that the FAA had done everything *but* discriminate against the petitioner because of his handicap, having gone to "unusual and extraordinary lengths to find employment for [the petitioner] because he was the son of a respected agency employee" (*ibid.*).

The court of appeals affirmed (Pet. App. A1). After reviewing the elements necessary to establish a prima facie case of employment discrimination under Section 504 of the Rehabilitation Act, the court concluded that petitioner had not met the initial requirement of proving that an electronics technician's position had been available (Pet. App. A1).

3. Petitioner argues that the court of appeals' finding on the unavailability of suitable positions for petitioner contradicts that made by the district court (Pet. 6-12). Petitioner contends that the district court, in preliminary findings issued from the bench, "specifically determined" that there were suitable electronics technician positions available in the Airways Facilities Division when petitioner applied (*id.* at 7).

Petitioner's contention is without merit. To be sure, the district court in its preliminary findings did note that between July 1979 and August 1980, the period in which petitioner sought employment with the FAA, "there were several opportunities within the entry level GS-3, 4 to which [petitioner] aspired" (Pet. App. C1). But the court also explained just one sentence later that it was "clear from the evidence" that the positions "these days" were usually filled only through "a special hiring authority of one sort or another" — such as educational programs for the economically disadvantaged and internal advancement or promotion schemes (*ibid.*). In any event, the court indicated several times in its subsequent Memorandum and Order that every electronics technician trainee position had already been allocated by the time petitioner applied (Pet. App. C2). Thus, even if this Court were to construe the district court's preliminary findings as ambiguous, the district court's subsequent and unambiguous opinion clarifies those earlier findings adversely to the petitioner. See *American Propeller & Mfg. Co.* v. *United States*, 300 U.S. 475, 479-480 (1937). In short, because the court of appeals affirmed the district court's finding as to job availability as "supported by evidence and * * * not clearly erroneous" (Pet. App. A1), there is no reason for this Court to review this factual matter. See *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

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